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SOUTHERN INVESTMENT BANK BHD/SOUTHERN BANK & ANOR v. YAP FAT & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
ABDUL RAHMAN SEBLI JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-01(A)-96-04-2016]
16 MARCH 2017

C ***LABOUR LAW:*** *Dismissal – Constructive dismissal – Employee told to leave employment – Employee to be paid bonus and salary increment if resignation is done voluntarily – Employee gave employer three months' notice of resignation as required by contract of employment – Employee enjoyed monthly salary, increment and bonus during three months' notice – Whether resignation voluntary – Whether employee constructively dismissed – Whether there was any conduct by employer* D *which rendered continued employment impossible, unreasonable and unbearable*

The first respondent was employed by the first appellant ('SIBB') in 1994. He later rose to become the CEO in 1998. Following the appointment of a new CEO ('Goh'), the first respondent was told to leave the appellants' bank and that if he resigned voluntarily, he would be paid bonus and salary E increment. The first respondent refused to resign from SIBB and, in his letter to SIBB, expressly stated that he considered himself constructively dismissed and gave SIBB three months' notice of his resignation as required by his contract of employment. The first appellant viewed this as a voluntary resignation by the first respondent. The dispute between the first appellant F and the first respondent was referred to the Industrial Court ('the second respondent') and the second respondent found the first respondent's dismissal to be without just cause or excuse. Aggrieved, the appellants filed an application for judicial review at the High Court to quash the award issued by the second respondent. In dismissing the application, the High Court G Judge ('the HCJ') held that the first respondent was constructively dismissed as (i) no salary increment or bonus was given to the first respondent; and (ii) some of the first respondent's duties and responsibilities were removed from him. Hence, the present appeal. The appellants submitted that the HCJ erred in law and in fact when Her Ladyship failed to judicially appreciate that (i) the first respondent resigned on his own volition and provided three months H prior notice to the appellants; (ii) although the first respondent considered himself constructively dismissed, he delayed in leaving employment and continued to enjoy his monthly salary and other employment benefits for a period of three months; and (iii) there was no protest by the appellant of his

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last day of employment. The first respondent argued that (i) given the circumstances, he had no choice but to resign and deemed himself to be constructively dismissed by the first appellant; and (ii) based on an e-mail, Goh withheld payment of his salary increment and bonuses.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) Constructive dismissal occurs where an employee resigns because of his employer's behaviour. In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee – unless waiver, estoppel or acquiescence is in issue. There are four conditions which have to be met by an employee to successfully claim for constructive dismissal, namely (i) there must be a breach of contract by the employer; (ii) the breach must be sufficiently important to justify the employee resigning; (iii) the employee must leave in response to the breach and not for any other unconnected person; and (iv) he must not occasion any undue delay in terminating the contract otherwise he will be deemed to have waived the breach and agreed to vary the contract. (paras 11 & 15)

(2) Based on evidence, the constructive dismissal contended by the first respondent was devoid of substance and he failed to discharge the onus to prove that there was any breach of the employment contract by the appellants; let alone one which goes to the root of the contract justifying the resignation of the first respondent. (para 18)

(3) Goh's e-mail was general in nature and did not make any reference whatsoever to the first respondent. It did not contain any instructions by Goh to withhold payment of the first respondent's bonus and salary increment. The first respondent continued to enjoy his monthly salary along with other benefits accorded to him under his employment contract during the three months' notice period. The removal of certain duties and responsibilities from the first respondent's portfolio did not constitute a demotion. Demotion involves a situation where an employee is relegated to a subordinate or less important position constituting a deduction to a lower grade or rank with a corresponding decrease in duties and responsibilities and usually accompanied by a decrease in salary. (paras 22 & 26)

(4) The first respondent voluntarily resigned from his employment. The three months' notice given in the letter was a voluntary exercise of the first respondent's right under his contract of employment and the appellants merely accepted the first respondent's notice of resignation. As a former CEO, the first respondent could not have been an

unsuspecting or gullible person who misunderstood the importance of the three months' notice given in his letter. Furthermore, there was nothing that showed that the letter of resignation was tainted with deceit or coercion. (paras 27 & 28)

(5) In a claim for constructive dismissal, it is imperative for the employee to take immediate steps in walking out of his employment within a reasonable time after the alleged breach of contract. Failing which, the employee would be deemed to have waived the breach and agreed to vary the contract. The first respondent's delay of approximately five months in leaving employment showed that there was never any conduct by the appellants which rendered continued employment impossible, unreasonable and unbearable. (paras 29 & 30)

Bahasa Malaysia *Headnotes*

Responden pertama mula bekerja dengan perayu pertama ('SIBB') pada 1994. Dia kemudian menjadi CEO pada 1998. Susulan pelantikan CEO baharu ('Goh'), responden diminta meninggalkan bank perayu dan jika dia sukarela meletak jawatan, dia akan dibayar bonus dan kenaikan gaji. Responden pertama enggan meletak jawatannya di SIBB dan, dalam surat kepada SIBB, menyatakan dia menganggap dirinya diberhentikan secara konstruktif dan memberi SIBB notis tiga bulan seperti yang ditetapkan dalam kontrak perkhidmatannya. Perayu pertama beranggapan ini satu peletakan jawatan sukarela oleh responden pertama. Pertikaian antara perayu pertama dan responden pertama dirujuk kepada Mahkamah Perusahaan ('responden kedua') dan responden kedua memutuskan pemberhentian responden pertama dibuat tanpa alasan atau sebab adil. Terkilan, perayu-perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi untuk membatalkan award responden kedua. Dalam menolak permohonan tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan responden pertama diberhentikan secara konstruktif kerana (i) gajinya tidak dinaikkan dan bonusnya tidak diberi; dan (ii) beberapa tugas dan tanggungjawab responden pertama dilucutkan daripadanya. Maka timbul rayuan ini. Perayu-perayu menghujahkan HMT terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa (i) responden pertama meletak jawatan dengan rela dan memberi notis awal tiga bulan kepada perayu-perayu; (ii) walaupun responden pertama menganggap dirinya diberhentikan secara konstruktif, dia lewat menamatkan perkhidmatan dan terus menikmati gaji bulanannya dan lain-lain faedah pekerja selama tiga bulan; dan (iii) tiada bantahan tentang hari terakhir pekerjaannya. Responden pertama menghujahkan (i) berdasarkan hal keadaan, dia tiada pilihan selain meletak jawatan dan menganggap dirinya diberhentikan secara konstruktif oleh perayu pertama; dan (ii) berdasarkan satu e-mel, Goh menahan bayaran kenaikan gaji dan bonusnya.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Pemberhentian konstruktif berlaku apabila seorang pekerja meletak jawatan kerana tindakan majikannya. Dalam pemberhentian konstruktif, isu utama ialah perilaku majikan dan bukan perilaku pekerja – kecuali jika isunya adalah pengetepian, estopel atau persetujuan. Terdapat empat syarat yang perlu dipenuhi oleh seorang pekerja untuk berjaya dalam tuntutan pemberhentian konstruktif iaitu (i) mesti berlaku pelanggaran kontrak oleh majikan; (ii) pelanggaran mestilah penting hingga mewajarkan pekerja meletak jawatan; (iii) pekerja mestilah meletak jawatan sebagai balasan pada pelanggaran tersebut dan bukan sebab lain-lain orang yang tidak berkaitan; dan (iv) dia tidak lewat dalam menamatkan kontraknya; jika tidak dia dikatakan mengetepikan pelanggaran dan bersetuju mengubah kontrak.

(2) Berdasarkan keterangan, tuntutan pemberhentian konstruktif oleh responden pertama tidak berasas dan dia gagal melepaskan beban untuk membuktikan berlaku apa-apa pelanggaran kontrak perkhidmatan oleh perayu-perayu; apatah lagi apabila akar umbi kontrak itu sendiri yang mewajarkan peletakan jawatan responden pertama.

(3) E-mel Goh bersifat umum dan tidak membuat apa-apa rujukan pada responden pertama. E-mel tersebut tidak mengandungi apa-apa arahan daripada Goh untuk menahan bayaran bonus dan kenaikan gaji responden pertama. Responden pertama menikmati gaji bulanannya secara berterusan serta faedah-faedah lain bawah kontrak perkhidmatannya sepanjang notis bertempoh tiga bulan itu. Pelucutan beberapa tugas dan tanggungjawab daripada bidang tugasnya bukan satu penurunan pangkat. Penurunan pangkat melibatkan situasi penurunan seorang pekerja ke kedudukan lebih rendah atau kurang penting iaitu pengurangan gred atau pangkat serta pengurangan tugas dan tanggungjawab yang turut melibatkan pengurangan gaji.

(4) Responden pertama meletak jawatan secara sukarela. Notis tiga bulan yang diberi dalam surat tersebut adalah penjalanan hak responden secara sukarela bawah kontrak perkhidmatannya dan perayu-perayu sekadar menerima notis peletakan jawatan responden pertama. Sebagai bekas CEO, responden pertama tidak boleh dikatakan seorang yang tidak menaruh syak wasangka atau terperdaya hinggakan boleh tersalah faham akan kepentingan notis tiga bulan yang diberi dalam suratnya. Tambahan pula, tiada apa-apa yang menunjukkan surat peletakan jawatan tersebut tercemar dengan penipuan atau paksaan.

(5) Dalam tuntutan pemberhentian secara konstruktif, seorang pekerja perlu serta merta meninggalkan perkhidmatan dalam masa munasabah selepas berlaku pelanggaran kontrak. Kegagalan berbuat demikian bermaksud pekerja mengetepikan pelanggaran dan bersetuju mengubah kontrak. Kelewatan responden pertama selama kira-kira lima bulan untuk meninggalkan perkhidmatan menunjukkan tiada apa-apa tindakan oleh perayu-perayu yang menjadikan perkhidmatan berterusan tidak mungkin, tidak munasabah dan tidak tertanggung.

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 HC ***(refd)***
Bayer (M) Sdn Bhd v. Anwar Abd Rahim [1996] 2 CLJ 49 HC ***(refd)***
Courtaulds Northern Textiles Ltd v. Andrew [1979] IRLR 84 EAT ***(refd)***
Elya Designs Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor [2011] 3 CLJ 929 HC ***(refd)***
Joseph v. Rey Lenferna Ltd [2008] SCJ 342 ***(refd)***
Kelang Container Terminal Sdn Bhd v. Tuan Syed Khadzail Syed Salim [1993] 1 ILR 1 ***(refd)***
Lim Seng Huat v. Fiamma Sdn Bhd [1997] 1 CLJ 90 CA ***(refd)***
Moo Ng v. Kiwi Products Sdn Bhd, Johor & Anor [1998] 3 CLJ 475 HC ***(refd)***
Murray v. Minister of Defence [2008] 29 ILJ 1369 [SCA] ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
Western Excavating (ECC) Ltd v. Sharp [1978] 1 QB 761 ***(refd)***
Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

For the appellants - Thavalingam & Sharan Kaur Gill; M/s Lee Hishammuddin Allen & Gledhill
For the 1st respondent - YY Ho & Esther Hor; M/s YY Ho & Lee

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-224-12-2014 (overruled).)

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This appeal is directed against the decision of the High Court dated 15 March 2016 dismissing the appellants' application for judicial review to quash the award made by the Industrial Court *vide* Award No. 1120 of 2014 which was handed down on 30 September 2014. In the terms of the award, the Industrial Court found that the first respondent's dismissal was without just cause or excuse.

Backgrounds Facts

[2] By and large, the facts in this instant appeal were in common ground. Such facts included the following:

(a) The first respondent was employed by Southern Investment Bank Berhad ("SIBB") (formerly known as "Perdana Merchant Bankers Berhad") in 1994. The first respondent was subsequently promoted to be the Vice President in 1995, Senior Vice President and Acting Chief Executive Officer ("CEO") in addition to his position as Director, Head of Capital Market Department, in 1998.

(b) On 1 March 2015, one Goh Ching Yin ("Mr Goh") was appointed as a new CEO in SIBB.

(c) On 26 May 2005, a meeting was convened between Mr. Goh and the first respondent to discuss the first respondent's future in SIBB. During the meeting, Mr. Goh conveyed the order given by Tan Sri Tan Teong Hean for the first respondent to leave the appellants' bank. Mr. Goh also informed the first appellant that if he resigned voluntarily in writing, he will be paid the bonus and salary increment which was due to be paid soon.

(d) The first respondent was shocked and asked for reasons why he was told to resign after all his years of service and contribution to the appellants' bank.

(e) On 1 June 2015, the first respondent wrote a letter to SIBB and placed on records the events which had transpired during the meeting between Mr Goh and him on 16 May 2015 and stated that he was refused to resign from SIBB as requested. There was no reply from the appellants.

(f) On 12 July 2005, the first respondent wrote another letter to SIBB. In the said letter, the first respondent had expressly stated that he considered himself constructively dismissed with effect from the date of the letter, ie, 12 July 2005. In the same breath, the first respondent gave the first appellant three months' notice of his resignation as required by his contract of employment.

(g) The first appellant viewed this letter as a voluntary resignation by the first respondent and responded to the resignation accordingly *vide* a letter dated 7 October 2015 in which the appellant notified the first respondent that his last working day is calculated to be on 11 October 2005 – three months from 12 July 2005.

(h) While the first respondent served the three months' notice period, the first respondent continued to enjoy his monthly salary along with other benefits accorded to him under his employment contracts. His last drawn salary was RM18,830.

(i) The dispute between first appellant and the first respondent was referred to the Industrial Court ("the second respondent") for adjudication. As alluded to earlier, the Industrial Court found that the first respondent's dismissal was without just cause or excuse.

(j) Aggrieved by the second respondent's award, the appellants then filed their application for judicial review to quash the award issued by the Industrial Court. On 15 March 2016, the High Court dismissed the appellants' application. Hence, the appellants appealed to this court.

Issue

[3] Before us, the sole issue for determination is whether the first respondent had resigned voluntarily from this employment or he was constructively dismissed.

Findings Of The High Court

[4] The learned High Court Judge's reasoning in deciding that the first respondent was constructively dismissed can be summarised as follows:

(a) No salary increment or bonus was given to the first respondent; and

(b) Some of the first respondent's duties and responsibilities were removed from him;

[5] Concerning the issue of salary increment and bonus, the learned High Court Judge stated at pp. 22-23 of the supplementary record of appeal:

> In his evidence before the 2nd Respondent, the 1st Respondent unequivocally stated that the new CEO implemented his threat where the 1st Respondent was not given salary increment or bonus payment respectively, for the years 2004 and 2005 … This evidence was unchallenged by the applicants
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> …
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> The 2nd Respondent in its finding concluded that the Applicants committed a breach of a fundamental term which goes to the root of the 1st Respondent's contract of employment
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> …
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> Having heard the case for twelve days, the 2nd Respondent rightly concluded that the Applicants had breached a fundamental term of the 1st Respondent's contract of employment.

[6] Concerning the removal of the first respondent's duties and responsibilities, the learned High Court Judge held that the "agency" function was removed from the first respondent's portfolio ie, from the Capital Market Department to the Credit Administrative Department and such removal can be construed as demotion and/or victimisation.

The Appeal

[7] Before us, learned counsel for the appellants submitted that the learned High Court Judge erred in law and in fact when Her Ladyship failed to judicially appreciate that:

(a) the first respondent had resigned on his own volition and provided three months prior notice to the appellants of his resignation as required by the terms of his employment;

(b) although the first respondent claims that he had considered himself constructively dismissed, he delayed in leaving employment and continued to enjoy his monthly salary and other employment benefits for a period of three months; and

(c) There was no protest from the first respondent when he was informed by the appellants of his last day of employment.

Parties' Competing Submission

[8] Learned counsel for the appellants submitted that the second respondent had erred in law and in fact and had arrived at a decision which no reasonable tribunal similarly circumstanced would have come to and the High Court had similarly erred when it failed to exercise its jurisdiction to amend the errors of law and fact which had been committed.

[9] Learned counsel for the appellants vehemently argued that the first respondent had resigned voluntarily from his employment by giving the appellants three months notice of his resignation. It was the contention of learned counsel that the first respondent had failed to establish that he was dismissed on 12 July 2005 as alleged.

[10] In reply, learned counsel for the first respondent submitted that the first respondent did not voluntarily resign but considered himself to be constructively dismissed by the appellants. The resignation of the first respondent was caused by the sequence of events ie, from not getting his increment and bonus to the removal of his duties and responsibilities. In the circumstances, the first respondent had no choice but to "resign" and deemed himself to be contractively dismissed by the first appellant.

Our Findings

[11] Constructive dismissal occurs where an employee resigns because of his employer's behaviour. In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue.

[12] The notion of constructive dismissal comes from the concept that (as it is phrased in United Kingdom): "An employer must not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee". (See *Courtaulds Northern Textiles Ltd v. Andrew* [1979] IRLR 84, EAT).

[13] In *Wong Chee Hong v. Cathay Organisation Malaysia Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 at p. 301, Salleh Abas LP explained the meaning of "constructive dismissal" as follows:

> We think that the word "dismissal" in this section should be interpreted with reference to the common law principle.
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> Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd*. [1970] Lloyd's LR 486).
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> In *Bouzourou*'s case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan*'s case the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

[14] Gopal Sri Ram JCA (as he then was) in *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 at 19 described "constructive dismissal" as follows:

> A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a "constructive dismissal". There is no magic in the phrase. It simply means this.
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> An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong (ibid).* Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to

tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[15] There are four conditions which have to be met by an employee to be able to successfully claim for constructive dismissal. The High Court in *Bayer (M) Sdn. Bhd v. Anwar Abd Rahim* [1996] 2 CLJ 49 set out the four conditions as follows:

(1) there must be a breach of contract by the employer;

(2) the breach must be sufficiently important to justify the employee resigning;

(3) the employee must leave in response to the breach and not for any other unconnected reason; and

(4) he must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

(See *Wong Chee Hong v. Cathay Organisation, supra*)

Where the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the Act.

(emphasis added).

[16] The above decision was endorsed by the Court of Appeal in *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 CLJ 197. The appeal against the decision of the Court of Appeal was dismissed by the Federal Court.

[17] It is interesting to note that the Court of Appeal of South Africa formulated the test for constructive dismissal under the common law in *Murray v. Minister of Defence* [2008] 29 ILJ 1369 (CA) as follows:

The employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

[18] We agreed with the submission of learned counsel for the appellants that in the overall conspectus of evidence adduced in this instant appeal, the constructive dismissal contended for by the first respondent was devoid of substance, and he failed to discharge the onus on him to prove that there was

any breach of the employment contract by the appellant, let alone one which goes to the root of the contract justifying the resignation of the first respondent.

[19] It is trite that the employee must prove that the employer's action amounted to a fundamental breach of contract or the law. In *Moo Ng v. Kiwi Products Sdn. Bhd., Johor & Anor* [1998] 3 CLJ 475, the court stated:

> In a broad sense constructive dismissal occurs when an employer repudiates a contract of employment. The repudiation may take the form of a breach, anticipatory breach or notice of intention. It may be express or implied and it must go to the substance of the contract.
>
> If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an expressor implied term of the contract of employment going to the very root of the contract.

[20] It is important, therefore, to be cautious in adopting a wide interpretation of what conduct by an employer that would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then resile and claim to be constructively dismissed. The paramount consideration is the requirement that the breach must be so serious which goes to the root of the contract and the employee cannot be expected to continue with the contractual arrangement.

[21] We now turn to consider in detail the grounds raised by the appellant in impugning the decision of the learned High Court Judge.

Salary Increment And Bonus

[22] The first respondent alleged that Mr Goh, the new CEO, withheld payment of his salary increment and bonuses. The allegation was anchored on an email dated 31 May 200. We have scrutinised the said e-mail and found that nowhere in it is there any instructions by the new CEO to withhold payment of bonus and salary increment to the first respondent. The e-mail is general in nature and does not make any reference whatsoever to the first respondent.

[23] Our courts have consistently recognised and upheld that any annual increment of salary or bonuses that may be awarded to the employees is at the absolute discretion of the management. In *Lim Seng Huat v. Fiamma Sdn Bhd* [1997] 1 CLJ 90, this court had adjudicated on this point as follows:

> The payment of bonus is dependent on the discretion of the employer unless the said bonus is a contractual bonus, of which there is no evidence here. Hence the High Court was right in setting aside the bonus award made by the Industrial Court.

Removal Of The First Respondent's Duties And Responsibilities

[24] The law recognises that in pursuit of its legitimate interest, the management has the prerogative to assign or transfer employees from one area of operation to another provided there is no demotion in rank or diminution of salary, benefits, and other privileges; and the action is not motivated by discrimination, made in bad faith, or effected as a form of punishment or demotion without sufficient cause. This is a privilege inherent in the employer's right to control and manage his enterprise effectively. For this reason, courts often decline to interfere in legitimate business decisions of employers. In fact, industrial relations laws discourage interference in employer's decisions concerning the conduct of their business. (See *Elya Designs Sdn. Bhd. v. Mahkamah Perusahaan Malaysia & Anor* [2011] 3 CLJ 929 (HC)).

[25] In our view, the transfer of the "agency" function from the first respondent's portfolio, ie, from the Capital Market Department to the Credit Administrative Department, is the prerogative of the CEO and was carried out in line with the structural revamping instructed by the new CEO, Mr Goh. These actions cannot be construed as a breach going to the root of the employment relationship between the first respondent and the appellants.

[26] In our view, the removal of certain duties and responsibilities from the first respondent's portfolio did not constitute a demotion on part of the first respondent. Demotion involves a situation where an employee is relegated to a subordinate or less important position constituting a deduction to a lower grade or rank, with a corresponding decrease in duties and responsibilities, and usually accompanied by a decrease in salary. It is not in dispute that the first respondent continued to enjoy his monthly salary along with other benefits accorded to him under his employment contract during the three months' notice period.

Voluntarily Resignation

[27] We were not persuaded that the first respondent had not voluntarily resigned from his employment. The three months' notice given in the first respondent's letter of 12 July 2005 was a voluntary exercise of the first respondent's right under his contract of employment and the appellants had merely accepted the first respondent's notice of resignation.

[28] As a former CEO of the company, the first respondent could not have been an unsuspecting or gullible person who misunderstood the importance of the three months' notice given in his letter dated 12 July 2005. Further, there was no showing either that the letter of resignation was tainted with deceit or coercion.

A **The First Respondent's Delay**

[29] That, however, is not the end of the matter. In our view, the first respondent's delay of approximately five months in leaving employment goes to show that there was never any conduct by the appellants which rendered continued employment impossible, unreasonable and unbearable as
B alleged by the first respondent.

[30] It is trite that in a claim for constructive dismissal, it is imperative for the employee to take immediate steps in walking out of his employment within a reasonable time after the alleged breach of contract, failing which the employer will be deemed to have waived the breach and agreed to vary
C the contract.

[31] In *Kelang Container Terminal Sdn Bhd v. Tuan Syed Khadzail bin Syed Salim* [1993] 1 ILR 1, the Industrial Court had this to say on the issue of delay:

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> What made the Claimant wait until 24 January 1991 to complain? Why did he delay his departure? Then the speed between his decision to leave and his new employment letter within a period of five days was very unusual. He was to report for duties as Senior Manager of Human Resources and Administration of Celcom on 2 February 1991. I am more inclined to hold the view that it was his new appointment which helped
E him to make up his mind to leave after he had earlier elected to stay on.
>
> After considering the facts and surrounding circumstances of this case this Court finds that the Company had breached the terms of the contract of employment of the Claimant but the Claimant had by his delay implied that he had elected to affirm the contract rather than accept the
F repudiation to end the contract. The Court therefore upholds the dismissal.

[32] In *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 QB 761, 769C, Lord Denning said that employee "must make up his mind soon after the conduct which he complains: for if he continues for any length of time without
G leaving, he will lose his right to treat himself as discharged".

[33] In *Joseph v. Rey Lenferna Ltd* [2008] SCJ 342, the employee had been the manager of a department with responsibility for sales, marketing and administration as well as technical aspects, but, after a takeover of another company, a co-manager was appointed in respect of the former aspects, while
H his activity was limited to the technical. It was found on the facts that he had accepted the change without protest and had worked for a month, before deciding to leave and found his own company. His claim for constructive dismissal was dismissed. The Supreme Court said that:

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In a case of constructive dismissal, the employee's response to the employer's conduct is an important factor. The employee must be careful that his response does not imply a willingness to accept the new conditions. He must not stay on in circumstances which imply that he does not regard his employer's conduct as entitling him to terminate his contract of employment.

Conclusion

[34] In the premises, we allowed the appeal with costs of RM5,000 and set aside the decision of the learned High Court Judge. So ordered.